# Petition

# 81-233

Office-Supreme Court, U.S.
FILED
JUN 26 1981
ALEXANDER L. STEVAS,
CLERK

SUPREME COURT CASE NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1980

---

RICHARD E. TAYLOR
PETITIONER

v.

UNITED STATES OF AMERICA
RESPONDENT

---

ON WRIT OF CERTIORARI TO THE UNTED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

PETER SHENAS
110 West "A" Street
Suite 1500
San Diego, CA 92101
(714) 236-1777

Attorney for Petitioner
Counsel of Record and
Upon Whom Service Shall
Be Made

MICHAEL E. CAHILL
110 West "A" Street
Suite 1500
San Diego, CA 92101
(714) 236-1777

SUPREME COURT CASE NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1980

---

RICHARD E. TAYLOR
PETITIONER

v.

UNITED STATES OF AMERICA
RESPONDENT

---

ON WRIT OF CERTIORARI TO THE UNTED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

# PETITION FOR WRIT OF CERTIORARI

PETER SHENAS
110 West "A" Street
Suite 1500
San Diego, CA 92101
(714) 236-1777

Attorney for Petitioner
Counsel of Record and
Upon Whom Service Shall
Be Made

MICHAEL E. CAHILL
110 West "A" Street
Suite 1500
San Diego, CA 92101
(714) 236-1777

## QUESTIONS PRESENTED FOR REVIEW

1. Where a viable basis for collateral attack of a judgment is revealed during or immediately after the trial, but before the appeal, and where that collateral attack will have a substantial effect on a matter to be decided in the appeal from the judgment, should the decision on the appeal from the judgment be stayed until a determination of the issues to be decided in the collateral attack?

2. Where defendant is appealing a judgment of conviction on the grounds of improper admission of evidence for lack of foundation, and where he is also concurrently bringing a motion for writ of error coram nobis on the basis that the prosecuting attorney misrepresented to the court certain facts which formed the foundation for the admission of the evidence disputed in the direct appeal, should the decision on the appeal from the

judgment not be made until all the facts and issues in the writ of error coram nobis have been disclosed and resolved?

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW | i |
| TABLE OF CONTENTS | iii |
| TABLE OF AUTHORITIES | iv |
| OPINION BELOW | 1 |
| JURISDICTION | 2 |
| CONSTITUTIONAL PROVISIONS INVOLVED | 3 |
| STATEMENT OF THE CASE | 4 |
| REASONS FOR GRANTING THE WRIT | 18 |
| CONCLUSION | 32 |
| APPENDIX A | |
| APPENDIX B | |

## TABLE OF AUTHORITIES


| | Page |
|---|---|
| Boddie v. Connecticut, 91 S.Ct. 780, 401 U.S. 371, 28 L.Ed. 113 (1971) | 26 |
| Dubose v. Lefevre, 619 F.2d 973 (2nd Cir. 1980) | 28 |
| Goldberg v. Kelly, 90 S.Ct. 1011, 397 U.S. 254, 25 L.Ed.2d 287 (1970) | 26 |
| Kiger v. U. S., 315 F.2d 778, cert. denied 84 S.Ct. 270, 375 U.S. 924, 11 L.Ed.2d 166 (1963) | 28 |
| Mathews v. Eldridge, 96 S.Ct. 893, 424 U.S. 319, 47 L.Ed.2d 18 (1976) | 26 |
| Panham v. Cortese, 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed. 556 (1972) | 26 |
| Pate v. Holman, 341 F.2d 764 (Ala. 1965) | 29 |
| Ruetz v. Lash, 500 F.2d 1225 (Ind. 1974) | 29 |
| Silverman v. U.S., 5567 F.2d 655 (2nd Cir. 1977) | 28 |
| U. S. v. Anderson, 509 F.2d 312, 165 U.S. App. D. C. 390, cert. denied 95 S.Ct. 1427, 420 U.S. 991, 43 L.Ed.2d 672 | 27, 28 |

## TABLE OF AUTHORITIES


| | Page |
|---|---|
| U. S. v. Nixon, 94 S.Ct. 3090, 418 U.S. 683, 41 L.Ed.2d 1039 (1974) | 27 |
| U. S. v. Raddatz, 100 S.Ct. 2406 (1980) | 26 |
| U. S. v. Sanfilippo, 564 F.2d 176 (1977) | 28 |
| Wiman v. Powell, 293 F.2d 605 (1961) | 28 |

## OPINION BELOW

This Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit is made with reference to the opinion of that court decided March 20, 1981, on Appeal No. 78-2512, United State v. Taylor, Nos. 78-2512, 79-1240 (9th Cir. March 20, 1981), a copy of which is attached hereto as Appendix A. This petition is also made in light of the concurrent decision of the Court of Appeals for the Ninth Circuit in Appeal No. 79-1240 which appears in the same opinion cited above and which also appears in Appendix A.

## JURISDICTION

On March 20, 1981, the Court of Appeals entered judgment in Appeal No. 78-2512 affirming the conviction of Petitioner for wire fraud in violation of 18 U.S.C. Sections 1343 and concurrently therewith reversed and remanded to the District Court for determination those issues raised in Appeal No. 79-1240 regarding the writ of error coram nobis.

On April 3, 1981, Petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc with respect to Appeal No. 78-2512, which Petition was denied on June 17, 1981. (See Appendix B attached hereto.) Pursuant to Rules of the Supreme Court, Rules 20.1 and 20.4, the time for filing the Petition herein expires after sixty (60) days following June 17, 1981.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment V:

"No person shall . . . be deprived of life, liberty or property without due process of law . . ." [portions deleted].

## STATEMENT OF THE CASE

Petitioner Richard E. Taylor and one Dennis B. Wittman were jointly indicted under 18 U.S.C. Section 1343 for wire fraud in June, 1977. The basis for federal jurisdiction in the court of first instance, namely the Federal District Court for the Southern District of California, is United States Constitution, Article 3, Section 2, which extends the judicial power "to all cases, in law and equity, arising under the . . . laws of the United States . . ." On March 29, 1978, a jury found Petitioner guilty of the charge as stated above and Judgment and Commitment were entered on July 10, 1978, providing for imprisonment for one year and one day.

During the trial an issue as to the admissibility of Exhibit "24" arose. This Exhibit was a photocopy (or a photocopy of a photocopy) of a telex copy of a letter dated

January 16, 1975. Neither the original nor the telecopy, nor any document with an ink signature by Petitioner was ever produced at trial. Objection to the admissibility of the evidence was made by defense counsel midway during trial on the grounds that there existed an inadequate foundation for the admission of this secondary (or more remote) evidence. The evidence was admitted. Again, at the end of trial, defense counsel, Mr. Shenas, raised a subsequent objection and the following interchange took place:

> THE COURT: Well, now, here's my ruling. I understand your point. I am going to overrule your objection to the admissibility, and the evidence in the case will have to be whatever it is concerning what [Exhibit "24"] purports to be - ultimately turns out to be.
>
> MR. SHENAS [Defense Counsel]: Is that ruling based on a representation that the original of this letter has been subpoenaed from [Continental], from [Wittman's corporation], and from Home Federal by the Government?
>
> THE COURT: Yes.
>
> MR. SHENAS: Thank you.

THE COURT: Now, do you want something - and that's a representation you are willing to rely on?

MR. SHENAS: Your Honor, I don't know if that's true or not. If counsel will tell me that's true, I will believe it. He hasn't said that - anything.

MR. KELTON [Prosecuting Attorney]: What?

MR. SHENAS: That the original of that document was subpoenaed by the Government from [Continental], [Wittman's corporation], and Home Federal..

MR. KELTON: When the Grand Jury investigation was -

THE COURT: Now, can't you answer that question directly?

MR. KELTON: When the Grand Jury investigation was initiated -

THE COURT: Can't you answer it "yes" or "no"?

MR. KELTON: Yes.

THE COURT: Is that the answer, "Yes"? All right. Now, this is important when you come down to make a representation of that kind.

MR. KELTON: Judge, I must say for the record that there's no original that could be located. But I am making the statement after subpoenaes, after speaking to the attorneys, after speaking to everybody involved in this

transaction, and I really object to Mr. Shenas' implication that somebody has tampered with this evidence.

THE COURT: Just a minute. I am the person who is asking the question, whether [Wittman's corporation] has been subpoenaed, Home Federal has been subpoenaed, and the bank in Texas has been subpoenaed for the production of the original letter of January 16, 1975 - which was Telexed to Texas.

MR. KELTON: Yes, they have, and I would also say this, your Honor: There is no way that the original letter could have been in Texas because it was Telexed. That's the point.

THE COURT: Well, it would then show up with Home Federal, wouldn't it?

MR. KELTON: Home Federal does not have it.

THE COURT: All right. It's been subpoenaed there. That's the only thing I am asking about, and you said it has been. So that's enough. That's what you have said and we needn't have any more explanation.

And on that basis, I will accept this in evidence as secondary evidence.

Now, you know the responsibility you are assuming when you say it's been subpoenaed. Don't look so disheartened.

MR. KELTON: I'm not so disheartened, Judge. The only point I am trying to make is that I made a good faith offer of proof to the Court -

THE COURT: I am not suggesting you didn't make it in good faith. I am asking about a foundation for it, for my accepting in evidence secondary evidence.

MR. KELTON: I would just like to put my position on the record, your honor. I would take one second. That is this: That all I have to do to lay that foundation through this witness is establish a record that that was kept in the ordinary course of business at [Wittman's corporation], and that they do not have the original available. And this is my position under the Federal Rules. And I think I have made that clear.

THE COURT: All right. I will admit the document on the basis of secondary evidence because of your inability through subpoena power to produce the originals.

(See Appendix A, Page 815, footnote 5.)

The trial court admitted Exhibit "24" into evidence, relying entirely on representations made by the Government Attorney that the original of the letter had been subpoenaed for the trial.

Defense counsel's objections to the admissibility of Exhibit "24" were neither academic nor technical. As noted by the Ninth Circuit Court of Appeals, Exhibit "24" proved to be a vital piece of evidence for the Government in that it was used to rebut the Defendant's contention that a fraudulent scheme did not exist at the time of the transmission of the January 16, 1975, letter; in that it was used to corroborate in important respects the testimony of a key prosecution witness; and, most importantly, in that it provided evidence of an essential element of the charged offense-interstate communication to execute a fraud. (Appendix A, page 816.)

An issue at trial which was critical to the jurisdictional element of the crime charged was whether Petitioner had already signed the fraudulent letter dated January 16, 1975, (the predecessor of Exhibit "24") when it was telecopied from California to Texas, or

whether he had signed it after its transmission to Texas. (Appendix A, page 814.) Petitoner maintains that this letter was transmitted by telecopier to Houston from San Diego without his signature on it.

Immediately after the trial, the following facts indicated that the U. S. Attorney had misled the Court and Defense counsel in regard to the service of the supoenas which he alleged:

1. The file in this case did not contain evidence of either the issuance of the subpoenas in question or affidavits of service thereof.

2. DONALD SEIFERS, the F.B.I. agent apparently assigned to investigate the facts surrounding the subject prosecution and a person who assisted the Government in its preparation for trial, had stated that he was the individual who was responsible for subpoenaing all documents introduced by the Government at the trial and that while the

January 16, 1975, letter (the predecessor to Exhibit "24") had possibly been subpoenaed from all three of the entities referred to for purposes of the Grand Jury, he was quite sure that the letter had not been subpoenaed from at least two of the three entities (Home Federal, PH&D, INC. and Allied Bank) for the purposes of the trial. This was stated in an Affidavit of STEVEN D. GUY submitted in support of Defendant RICHARD E. TAYLOR's Motion for a New Trial, filed April 19, 1978, a copy of which was attached to the Points and Authorities in Support of Motion for a Writ of Error Coram Nobis.

3. By letter dated October 30, 1978, PETER SHENAS, attorney for Defendant, gave MR. KELTON an opportunity to produce some evidence of the truth of the alleged misrepresentations, but MR. KELTON failed to produce said evidence or even indicate that any existed. This fact was stated in an Affidavit of PETER

SHENAS submitted in support of the Writ of Error Coram Nobis.

4. Throughout this proceeding and throughout the appeal proceedings in Appeal No. 79-1240, the Government has skillfully and successfully maintained its shroud of ambiguity and has never come forth and said to the Court or to the Defense counsel: "We subpoenaed the original of Exhibit "24" for trial from the three entities." 1/

---

1/ On April 23, 1981, after three years (but not during the appeal), on a Motion to Clarify Written Opinion Prior to Publication and after the Opinion of Ninth Circuit had been rendered, the Government submitted copies of certain subpoenas. Apparently, it is these subpoenas the Government will ultimately proffer in the hearing on the writ of error coram nobis, although on their face the subpoenas further reinforce Defendant's allegations about misrepresentation. The Government has conceded that these subpoenas, whatever they are worth, do not form part of the record of the Court below.

5. There is no evidence known to Defendant supporting the truth of the representations of MR. KELTON. [2/]

After the trial, Defendant timely filed a Notice of Appeal and prosecuted the appeal from the judgment (referred to as the "Judgment Appeal") accordingly. One of the grounds alleged for reversal was the inadmissibility of Exhibit "24." Meanwhile Defense counsel was attempting to determine, despite non-cooperation by the U. S. Attorney's office, if his information as to the non-service of the subpoenaes was correct. He sent a letter to the U. S. Attorney requesting production of the subpoenaes. It was not answered. On November 15, 1978, Petitioner filed his Opening Brief in the Judgment Appeal. On the very same day, Defendant filed a Motion for

---

[2/] The only subpoenas tendered were those referred to in Footnote 1, which were first disclosed only recently, prior to the filing of this Petition for Writ of Certiorari.

Writ of Error Coram Nobis in the District Court alleging the misrepresentations of the U. S. Attorney, and requested a hearing thereon. The matter came on for hearing before Judge Turrentine on January 15, 1979, and on March 1, 1979, the motion was denied without a hearing on the merits. On March 13, 1979, Notice of Appeal from the Order Denying the Writ of Error Coram Nobis was timely filed and the appeal from the denial of the Writ of Error Coram Nobis was accordingly prosecuted (referred to herein as the "Coram Nobis Appeal").

At the time that both the Judgment Appeal and the Coram Nobis Appeal were before the Ninth Circuit Court of Appeals, it became apparent that the issue of the subpoenas was pivotal to the ultimate determination of both these matters. However, the facts were not forthcoming; in an artful fashion, the United States Attorney managed to avoid commitment in both appeals as to whether or not he issued

and served subpoenas. However, it did begin to appear from some of the language that the United States Attorney probably would, if forced to make a disclosure, take the position that he was referring to Grand Jury subpoenas, not trial subpoenas.[3/]

Because of the relationship between these appeals and because the Government appeared to take a continually evasive posture, Petitioner made a motion on December 28, 1978, to the Ninth Circuit Court of Appeals for an order consolidating the hearing on both appeals, and that consideration and determination of the Judgment Appeal be stayed pending final disposition of the Writ of Error Coram Nobis. By an order filed May 3, 1979, in the Judgment Appeal it was ordered by Ely and Wallace, Circuit Judges, and Tagasuki, District Judge, sitting by designation, that

---

[3/] This supposition is reinforced by the Government's belated presentation of the subpoenas referred to in Footnote 1, which included a Grand Jury subpoena.

the Coram Nobis Appeal herein be consolidated with the Judgment Appeal.

On March 20, 1981, the Ninth Circuit Court of Appeals rendered its decision in both appeals (See Appendix A attached.) The Court affirmed the judgment of the District Court in the Judgment Appeal. It is unclear, but it appears that the basis therefor was that either (1) the representations made by the prosecuting attorney as to the foundation of Exhibit "24" established a foundation under Federal Rules of Evidence, Rule 1004(2); or (2) Defense counsel stipulated to the admission of Exhibit "24" in reliance on the prosecuting attorney's representations. On the other hand, in the Coram Nobis Appeal, the Court of Appeals remanded the case back to the District Court for a hearing on the issue concerning the truth of the prosecuting attorney's statements which formed the foundation for the admission of Exhibit "24." (See Appendix A.) The prosecuting attorney had

represented that subpoenas had been issued at trial for the "original" of Exhibit "24." A serious issue as to the truth of these representations was raised.

On April 10, 1981, Petitioner filed a Petition for a Rehearing with a Suggestion for Rehearing En Banc, based upon the grounds stated herein, namely, that the Judgment Appeal ought to have been stayed pending an ultimate determination on the Writ of Error Coram Nobis. This Request for a Rehearing was denied on July 17, 1981. (See Appendix B.)

On April 24, 1981, the Government filed a Motion to Clarify Written Opinion Prior to Publication. It was this motion that first referred to any subpoenas at all. Certain subpoenas (including a Grand Jury subpoena) were attached to the Motion. The Motion was denied on June 2, 1981.

## REASONS FOR GRANTING THE WRIT

In view of the Ninth Circuit's decision in the Coram Nobis Appeal, it is Petitioner's contention that the disposition of the Judgment Appeal was premature and will result in a deprivation to Petitioner of due process of law. The decision in the Judgment Appeal ought to have been stayed until not only a determination of the Coram Nobis Appeal, but until a final determination of the matters to be heard on the remand of the Writ of Error Coram Nobis.

It was noted by the Ninth Circuit in this case that "the collateral claim casts . . . a dark shadow on a pivotal aspect of the direct appeal." (Appendix A, page 820.) "Taylor's coram nobis claim directly and seriously implicates this Court's decision in Taylor's direct appeal." (Appendix A, page 819.) And again "[T]aylor's collateral claim - challenging the truth of the Government's

representation - raises a disquieting question which threatens the very basis of our affirmance of Taylor's conviction." (Appendix A, page 820.)

We believe the Ninth Circuit exhibited a subtle and comprehensive appreciation of the substance of the Coram Nobis Appeal and of its interplay with the Judgment Appeal. However, Petitioner submits, the decision on the Judgment Appeal ought not to have been made until the final determination of the matters to be resolved in the Writ of Error Coram Nobis hearing. These determinations would then have become part of the record on the direct appeal and would provide the appeal court with a full and complete picture of all of the claims and facts underlying the admissibility of Exhibit "24."

Petitioner requested three times of the Ninth Circuit that it stay its decision on the Judgment Appeal pending an ultimate determination in the Writ of Error Coram Nobis.

Firstly, in the Judgment Appeal, Petitioner requested that the Court stay its decision in the Judgment Appeal until a final determination of the matters raised on the Writ of Error Coram Nobis. This request appeared in a footnote on page 18 of the Appellant's Brief in the Judgment Appeal as follows:

> "Note: There is currently before the District Court a Motion by Defendant herein for a Writ of Error Coram Nobis. The Motion is based on the grounds that the Government Attorney misrepresented the true facts to the Court since no subpoenas for the original had in fact been issued and served for trial. Defendant requests that the Court delay its decision on this Appeal until the final decision on the said Motion for Writ and until Defendant has the opportunity to file an Amended Appeal Brief." (Emphasis added.)

It was Petitioner's position that until a final determination in the coram nobis proceeding was obtained, there could be no final determination on the Judgment Appeal since the record would not be complete.

Secondly, Petitioner made the same request in its Motion for Postponement of Oral Argument and it briefed the reasons therefore in the Points and Authorities in support thereof. Thirdly, it so requested in its Petition for Rehearing and Suggestion for Rehearing En Banc, which Petition was denied by the Ninth Circuit.

It is axiomatic in Anglo-American jurisprudence that a court of appeal, in making its decision on an appeal, must rely upon, and can only rely upon, the record transmitted before it from the lower court. On the other hand, collateral relief sought by way of extraordinary writ does not bind a court of appeal to the confines of the record below. Rather, the court must then look outside the record to test the substantiation of the collateral attack.

On the hearing under the remand of the Coram Nobis Appeal, Number 79-1240, the District Court will make a decision concerning

the representations made by the prosecuting attorney during the trial. There are several possible conclusions which it may reach. What the evidence shows and what the Court decides in the coram nobis hearing will have a direct bearing on the foundation for the admissibility of Exhibit "24."

The basis for the admission of Exhibit "24" was the stipulation of Defense counsel. The Government in its Appellee Brief, this Court in its decision, and the Defendant in his Reply Brief in the Judgment Appeal (at pages 6 and 7) acknowledged that Defense counsel stipulated to the admission of Exhibit "24" on the basis of the representations of the prosecuting attorney as to the fact that the original document had been subpoenaed. The validity of the stipulation will be decided by the District Court in the coram nobis evidentiary hearing by an inquiry and analysis of the following issues:

1. What subpoenas requiring production of Exhibit "24" were in fact issued and served, if any? (Grand Jury, trial subpoenas, both, neither.)

2. On whom were they served?

3. What subpoenas did the prosecuting attorney intend to refer to when he made his representations?

4. What subpoenas was the judge contemplating that the prosecuting attorney was referring to?

5. What subpoenas was the Defense counsel contemplating that the prosecuting attorney was referring to when Defense counsel offered his stipulation on the basis of the representations of the prosecuting attorney?

If the District Court concludes that the conditions upon which the stipulation was offered by Defense counsel were not satisfied it must find the stipulation invalid. This conclusion would undermine and is absolutely contradictory to the basis of the Ninth

Circuit's affirmance of the admission of Exhibit "24" since that was predicated on the stipulation. (See Appendix A, page 817.) Since a critical fact necessary for the Ninth Circuit's decision on the Judgment Appeal has yet to be determined in the coram nobis proceeding, the decision on the Judgment Appeal must be stayed until the final decision on the Writ of Error Coram Nobis.

The validity of the stipulation could not have been raised by Taylor in the Judgment Appeal because the facts were not then, nor are they even now, known to him.[4/] As of the present time, only the prosecuting attorney knows fully what subpoenas have been served.

The anomaly lies in the fact that Taylor may be precluded from arguing a legitimate and viable ground of appeal since the ground, if it exists, has not yet

---

[4/] The Defense counsel has not been apprised whether the subpoenas referred to in Footnote 1 are intended to be supplemented or not by the Government.

become a part of the record. By the time the record becomes complete, the right to appeal will have already been exhausted.

This argument was previously made by Petitioner in his Reply Brief in the Judgment Appeal. Defendant therein noted that the artful ambiguity of the Government in all of its pleadings and points and authorities, was carefully elusive of any commitment that the subpoenas in question had been issued and served. In fact, Petitioner therein conceded, and must now again concede, that if the original record will support that trial subpoenas which specifically require the production of the original of Exhibit "24" were issued and served on all three parties, he will have stipulated to the admission of Exhibit "24" and have waived his right to object thereto. But the validity of this stipulation is what is at issue. The orderly administration of criminal justice in this type of situation would dictate a rule

permitting and requiring the collateral attack to pre-date the direct appeal where it will determine matters pertinent to the resolution of the direct appeal.

The "due process" clause of the United States Constitution, at a minimum, requires that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for a hearing appropriate to the nature of the case. Boddie v. Connecticut, 91 S.Ct. 780, 401 U.S. 371, 28 L.Ed. 113 (1971); U. S. v. Raddatz, 100 S.Ct. 2406 (1980). Procedural due process includes the right to notice and the opportunity to be heard at a meaningful time and in a meaningful manner. Panham v. Cortese, 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed. 556 (1972); Goldberg v. Kelly, 90 S.Ct. 1011, 397 U.S. 254, 25 L.Ed.2d 287 (1970); Mathews v. Eldridge, 96 S.Ct. 893, 424 U.S. 319, 47 L.Ed.2d 18 (1976).

Hypothesize that the District Court decides in the error coram nobis hearing

that what was being referred to by the prosecutor was Grand Jury subpoenas rather than subpoenas for trial, and that the court was not misled but Defense counsel was misled. Hypothesize further that the Appellate Court decides that service of Grand Jury subpoenas provided a sufficient foundation and that even if Defense counsel's stipulation was void, there was otherwise a proper foundation. Should not the Defendant be entitled to argue the sufficiency of Grand Jury subpoenas as a foundation in his Judgment Appeal?

The right of a defendant to production of all evidence at a criminal trial has constitutional dimensions. U. S. v. Nixon, 94 S.Ct. 3090, 418 U.S. 683, 41 L.Ed.2d 1039 (1974). Can misleading statements be less culpable than withheld statements? It is clear that the knowing use by a prosecutor of perjured testimony to secure a conviction is a denial of due process. U. S. v. Anderson, 509 F.2d

312, 165 U.S. App. D. C. 390, cert. denied 95 S.Ct. 1427, 420 U.S. 991, 43 L.Ed2d 672; Kiger v. U. S., 315 F.2d 778, cert. denied 84 S.Ct. 270, 375 U.S. 924; 11 L.Ed.2d 166 (1963); Wiman v. Powell, 293 F.2d 605 (1961); Silverman v. U. S., 556 F.2d 655 (2nd Cir. 1977); cases cited 13 West's Federal Practice Digest, Constitutional Law Section 266(6). This is true even if the perjured evidence or false testimony only goes to credibility. U.S. v. Sanfilippo, 564 F.2d 176 (1977); Dubose v. Lefevre, 619 F.2d 973 (2nd Cir. 1980). In the Dubose v. Lefevre case, supra, the Court stated at page 978:

> "Knowing use by the State of perjured testimony deprives the defendant of due process, violating the Fourteenth Amendment and requiring a new trial. This is so whether the prosecutor makes the false statements himself or allows the false statements of a witness to go uncorrected. . . . It makes no difference that the materially false testimony goes only to the credibility of a witness."

It is true that even in criminal cases due process does not require an appellate system. However, when an appeal is provided, it must meet the requirements of due process and equal protection. Pate v. Holman, 341 F.2d 764 (Ala. 1965); Ruetz v. Lash, 500 F.2d 1225 (Ind. 1974). Here, Petitioner ought to have the right to appeal the issue of the sufficiency of Grand Jury subpoenas if it turns out that the District Court relies on them as the basis for denying the Writ of Error Coram Nobis.

It is anticipated by Defendant, but still not known, after all this time, that what the Government will do is to seek to justify the admission of Exhibit "24" on the basis that a Grand Jury subpoena was issued and served, at least with respect to one party.[5/] In basing any argument on the theory

---

[5/] The subpoenas referred to in Footnote 4 contain only a Grand Jury subpoena in the case of one of the relevant parties, and it shows no return of proof of service.

that the issuance of Grand Jury subpoenas was sufficient, the Government ignores the fact that its representations were relied upon by opposing counsel in arriving at a stipulation to waive foundational evidence. It ignores the fact that no foundation was laid for the admission of Exhibit "24." Any Grand Jury proceedings antedated Defense counsel's involvement in the case. They are secret proceedings, are prosecutorial in nature and not adversarial. Defense counsel had no way of knowing what the Government did at those proceedings. He was prepared only to waive production of subpoenas in reliance on the Government's representation that it had attempted to subpoena the documents for the trial and not for some remote proceeding of a different nature. At the coram nobis hearing, the District Court may attempt to speculate as to whether Petitioner's counsel would have entered into the stipulation had he believed the Government was referring to Grand Jury

subpoenas. It must presume that the stipulation would not have been entered into.

It is by no means clear that Grand Jury subpoenas would have sufficed as a foundation for the introduction of Exhibit "24" (even if they did exist and there had been no misrepresentation). The Government has never cited any legal authority to the effect that they are sufficient. That, however, is not an issue which should be decided in the Writ of Error Coram Nobis proceeding but is one for the Judgment Appeal.

## CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

DATED: June 23, 1981. Respectfully submitted,

SHENAS, ROBBINS, SHENAS
& SHAW
A Professional
Corporation

By _____
PETER SHENAS
110 West "A" Street
Suite 1500
San Diego, CA 92101
(714) 236-1777

By _____
MICHAEL E. CAHILL
110 West "A" Street
Suite 1500
San Diego, CA 92101
(714) 236-1777

Attorneys for Petitioner
RICHARD E. TAYLOR

AFFIDAVIT OF SERVICE

RICHARD E. TAYLOR
PETITIONER

V.

UNITED STATES OF AMERICA
RESPONDENT

I, DEBRAH A. OAKES, secretary in the office of SHENAS, ROBBINS, SHENAS & SHAW, A Professional Corporation, attorneys of record for Pettiioner RICHARD E. TAYLOR, depose and say, that on July 31, 1981, I served three copies of PETITION FOR WRIT OF CERTIORARI on each of the below named persons by depositing them in a United States Post Office, with first class postage prepaid, to the addresses below:

M. JAMES LORENZ
United States Attorney
James B. Henderson
Special Attorney
U. S. Department of Justice
Room 2311, Federal Building
300 North Los Angeles California 90012

SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20530

All parties required to be served have been served.

Debrah A. Oakes
DEBRAH A. OAKES

Subscribed and sworn to before me at San Diego, California, this 31st day of July, 1981.

Maria A. Thorson
NOTARY PUBLIC IN
AND FOR THE STATE
OF CALIFORNIA

Appendix A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

Nos. 78-2512, 79-1240

---

| | |
|---|---|
| UNITED STATES of America,<br>Plaintiff-Appellee,<br><br>v.<br><br>Richard E. TAYLOR,<br>Defendant-Appellant. | Appeal from the United States District Court for the Southern District of California |

Before ELY and WALLACE, Circuit Judges, and TAKASUGI,* District Judge.

---

The subject causes have been consolidated on appeal. Because the cases involve a single defendant and arise from the same criminal proceeding, the facts of each cause are discussed together. The legal issues, however, are distinct and require separate resolution.

---

*Honorable Robert M. Takasugi, United States District Judge, Central District of California, sitting by designation.

## FACTS

Richard E. Taylor appeals from his conviction of wire fraud in violation of 18 U.S.C. § 1343 (1976) (No. 78-2512) and an order of the District Court denying his motion for a writ of error coram nobis (No. 79-1240).

Taylor and Dennis B. Wittman were jointly indicted for their part in the assertedly fraudulent acquisition of a substantial loan from the Continental Bank of Texas ("Continential"), in Houston, Texas. During the period of time covered by the indictment, late 1974 to early 1975, Taylor was a vice-president of the real estate department of Home Federal Savings and Loan Association ("Home Federal"), located in San Diego, California. The fraudulent "scheme or artifice" alleged by the Government was that Taylor and Wittman, who was a principal in several San Diego real estate development entitites, had induced Continental to make a $1.97 million loan to a corporation run by Wittman, on the basis of their false representations of several material facts. In a January 16, 1975 letter signed by Taylor and containing an initialed postscript, Taylor and Wittman blatantly misrepresented to Continental that Home Federal held a first lien on certain California real property. This letter was telecopied from San Diego to Houston, where Wittman received it, photocopied it, and delivered the photocopy to a loan officer of Continental. The photocopy tendered to Continental, which was the copy of the letter Continental relied on in approving the loan, was admitted into evidence at Taylor's trial as Government Exhibit "24." On January 23, 1975, Taylor

signed a letter agreement with Continental purporting to confirm Home Federal's first lien commitment.[1] After Taylor signed the letter agreement, without authorization, in his capacity as an officer of Home Federal, Continental funded the $1.97 million loan.

In July 1975, Wittman's corporation defaulted on the loan. Taylor and Wittman were indicted in June 1977; the Government's motion for severance was granted on January 16, 1978. Taylor's trial commenced on March 154, 1978.

An issue at trial critical to the jurisdictional element of the crime charged[2] was whether Taylor had already signed the fraudulent letter dated January 16, 1975 (the predecessor of Exhibit "24") when it was telecopied from California to Texas, or whether Taylor had signed it after its transmission to Texas. Neither the "original" nor the telecopy was ever produced at trial. Instead, the Government introduced Exhibit "24," which was either a photocopy of the telecopy or a more

---

1. This letter agreement was admitted as Government Exhibit "25."

2. 18 U.S.C. § 1343 (1976) requires that the "scheme or artifice to defraud" involve the transmission "by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice."

remote reproduction.[3] While Exhibit "24" did reflect Taylor's signature, it was never conclusively established that the exhibit was a direct copy of the telecopy, leaving open the possibility that the signature was not affixed prior to interstae communication. Taylor's counsel at trial objected to the admission of this potentially spurious document on the basis of the "best evidence rule." The trial court ultimately admitted Exhibit "24" as secondary evidence, relying on the Government's claim that the origianl document had been unsuccessfully subpoenaed from the relevant parties, i.e.,

---

3. An argument can be made that the "original" letter typed in San Diego is not the original, legally operative document for purposes of "best evidence" analysis because the officer of the defrauded Taxas bank made the loan in reliance of either the telecopy or a photocopy of the telecopy. Under this view, the latter documents, rather than the "original" typed letter, must be treated as legally operative originals. See United States v. Gerhart, 538 F.2d 807, 810 n.4 (8th Cir. 1976); 5 J. Weinstein & M. Berger, Weinstein's Evidence ¶1001(3)[01] to [02] (1978 & Supp.1979). Because we decide the admissibility issue on other grounds, we need not rule on this rationale.

Continental,[4] Home Federal, and Wittman's corporation.

In the course of the District Court's probe of the prosecuting attorney on the subpoena issue, Taylor's trial counsel made a qualified stipulation to the admission of the exhibit based on the truth of the Government's representations.[5]

---

4. Fed.R.Evid. 1004(2) provides, in pertinent part, as follows: "The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—... (2) ORIGINAL NOT OBTAINABLE. No original can be obtained by an available judicial process or procedure; ..."

5. A trial, the following colloquy between the district judge, defense counsel, and prosecutor took place:

> THE COURT: Well, now, here's my ruling. I understand your point. I am going to overrule your objection to the admissibility, and the evidence in the case will have to be whatever it is concerning what [Exhibit "24"] purports to be—ultimately turns out to be.
> MR. SHENAS [Defense Counsel]: Is that ruling based on a representation that the original of this letter has been subpoenaed from [Continental], from [Wittman's corporation], and from Home Federal by the Government?
> THE COURT: Yes.
> MR. SHENAS: Thank you.
> THE COURT: Now, do you want something—and that's a representation you are willing to rely on?
> MR. SHENAS: Your Honor, I don't know if that's true or not. If counsel will tell me

Exhibit "24" proved to be a vital piece of evidence for the Government. It was

---

5. (continued)

that's true, I will believe it. He hasn't said that—anything.
MR. KELTON [Prosecuting Attorney]: What?
MR. SHENAS: That the original of that document was subpoenaed by the Government from [Continental], [Wittman's corporation], and Home Federal.
MR. KELTON: When the Grand Jury investigation was—
THE COURT: Now, can't you answer that question directly?
MR. KELTON: When the Grand Jury investigation was initiated—
THE COURT: Can't you answer it "yes" or "no"?
MR. KELTON: Yes.
THE COURT: Is that the answer, "Yes"? All right. Now, this is important when you come down to make a representation of that kind.
MR. KELTON: Judge, I must say for the record that there's no original that could be located. But I am making this statement after subpoenas, after speaking to the attorneys, after speaking to everybody involved in this transaction, and I really object to Mr. Shenas's implication that somebody has tampered with this evidence.
THE COURT: Just a minute. I am the person who is asking the question, whether [Wittman's corporation] has been subpoenaed, Home Federal has been subpoened, and the bank in Texas has been subpoenaed for the production of the original letter of

used to rebut Taylor's contention that a fraudulent scheme did not exist at the

---

5. (continued)

January 16, 1975—which was Telexed to Texas.

MR. KELTON: Yes, they have, and I would also say this, your Honor: There is no way that the original letter could have been in Texas because it was Telexed. That's the point.

THE COURT: Well, it would then show up with Home Federal, wouldn't it?

MR. KELTON: Home Federal does not have it.

THE COURT: All right. It's been subpoenaed there. That's the only thing I am asking about, and you said it has been. So that's enough. That's what you have said and we needn't have any more explanation.

And on that basis, I will accept this in evidence as secondary evidence.

Now, you know the responsibility you are assuming when you say it's been subpoenaed. Don't look so disheartened.

MR. KELTON: I'm not disheartened, Judge. The only point I am trying to make is that I made a good faith offer of proof to the Court—

THE COURT: I am not suggesting you didn't make it in good faith. I am asking about a foundation for it, for my accepting in evidence secondary evidence.

MR. KELTON: I would just like to put my position on the record, your Honor. It would take one second. That is this: That all I have to do to lay that foundation through this witness is establish a record that that was kept in the ordinary course of business at [Wittman's corporation], and that they do

fraudulent scheme did not exist at the time of the transmission of the January 16, 1975 letter; it was used to corroborate in important respects the testimony of the proecution's key witness, Continental loan officer Michael Wells; and, most importantly, it provided evidence of an essential element of the charged offense--interstate communication to execute a fraud.[6]

The jury rendered a guilty verdict on March 29, 1978. Taylor was sentenced to a term of one year and a day. On July 12, 1978, Taylor filed a direct appeal from his conviction (No. 78-2512), assigning a variety of trial errors. The most significant allegation of error was that the District Court erred in the admission of Exhibit "24" because, inter alia, the copy was improper under the "best evidence rule" of the Federal Rules of Evidence.[7] In his direct appeal Taylor did not impugn the veracity of the Government's statements concerning the inability of the

---

5. (Continued)

> not have the original available. And that is my position under the Federal Rules. And I think I have made that clear.
> THE COURT: All right. I will admit the document on the basis of secondary evidence because of your inability through subpoena power to produce the originals.

R.T., Vol. V, at 51-54 (emphasis added). See also id. at 43.

6. See note 2 supra.

7. See Fed.R.Evid. 1002, 1003, 1004.

subpoena power to uncover the original document, since resolution of that matter necessarily involved matters outside the trial record. Taylor made a personal request for proof of the subpoenas. Unfortunately, the Government did not respond with such proof.[8]

On November 15, 1978, Taylor filed a motion in the District Court for a writ of error coram nobis challenging the Government's subpoena representations and requesting a hearing thereon. The District Court denied Taylor's motion without a hearing, due, in part, to the pendency of the direct appeal before this Court. Taylor filed an appeal (No. 79-1240) from an order of summary denial on March 12, 1979. Later, on May 3, 1979, following oral argument in the direct appeal, the two causes--direct and colalteral--were consolidated. On January 15, 1980, both were submitted for decision.

---

8. We do not pass on whether the Government was obliged to respond to defense counsel's non-judicial request for proof of the subpoenas. Our analysis of the due process anbd coram nobis issues assumes that no duty existed. It bears emphasis, however, that the Government's literal compliance does little to conserve judicial resources, since we have been forced to deal with the subpoena issue in the abstract.

## DISCUSSION

### I. No. 78-2512

Taylor raises several claims of error in his direct appeal, the most serious of which is that the District Court erred in admitting Exhibit "24" into evidence. Having determined that these claims are without merit, we affirm Taylor's conviction.

[1,2] Taylor argues that because Exhibit "24" is at best a photocopy of the telecopied January 16, 1975 letter, it was improperly admitted into evidence. Federal Rule of Evidence 1002, Taylor correctly asserts, requires the production of the "original" writing to prove the contents thereof, "except as otherwise provided." Taylor contends that since Exhibit "24" is neither an "original" under Rule 1002 nor a "duplicate" within the exception of Rule 1003,[9] it should not have been admitted into evidence.

---

9. Fed.R.Evid. 1003 provides that a "duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."
Fed.R.Evid. 1001(4) defines "duplicate" as "a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces [sic] the original."

Taylor's agument overlooks the state of the trial record and the clear application of the exception of Rule 1004(2), which allows the admission of secondary evidence when the "original" cannot be obtained by available judicial procedures.[10] When Exhibit "24" was offered for introduction into evidence at trial, the Government represented to the District Court that subpoenas requesting the "original" letter--i.e., the one typed in San Diego--[11] had been served on the parties and that the "original" was not produced. In reliance on this representation, the District Corut admitted Exhibit "24" into evidence. Taylor's counsel[12] did not object to the exhibit's admission. Because Taylor's counsel failed to object to the admission of Exhibit "24," and even stipulated to the unavailability of the "oiriginal" letter, the record on direct appeal compels that we reject Taylor's "best evidence" argument.[13]

---

10. See note 4 supra.

11. Cf. note 3 supra (telecopy or photocopy of telecopy might be legally operative "original").

12. Taylor's argument that the Government factually misrepresented the issuance of subpoenas duces tecum to obtain the original letter is discussed separately in the coram nobis appeal, No. 79-1240.

13. See note 5 supra. Whether the subpoenas issued were trial subpoenas or grand jury subpoenas would not, in any event, be dispositive. The Advisory Committee Note to Rule 1004(2) contemplates a relatively lax standard of unavailability, surely met on the record here.

We have carefully considered Taylor's remaining claims and find that the District Court did not abuse its discretion, that the jury was properly instructed, and that the evidence was adequate to support thge jury verdict. Therefore, Taylor's conviction of wire fruad in the District Court is affirmed.

II. No. 79-1240

During the pendency of Taylor's direct appeal, he also filed a coram nobis motion with the District Court, the summary denial of which is the subject of the collateral appeal. In ruling on the denial of his collateral motion, we address solely the issue of whether Taylor has demonstrated that he is entitled to a hearing and do not decide whether relief is warranted. For the reasons set forth below, we reverse the District Court and remand for further proceedings.

[3] In the motion for a writ of error coram nobis[14] presented to the District Court below, Taylor levels alarming charges against the Government. He

---

14. The common-law writ of error coram nobis is available by statute, 28 U.S.C. § 1651(a0 (1976)(All Writs Statute), to correct errors of fact of such fundamental character as to render the proceeding itself irregular and invalid. United States v. Morgan, 346 U.S. 502, 505-13, 74 S.,Ct,.247, 249-53, 98 L.Ed. 248 (1954). Among other circumstances, it is available to vacate a federal conviction where the sentence imposed has not yet been served. Migdol v. United States, 298 F.2d 513 (9th Cir. 1961).

contends that the prosecuting attorney misled the trial judge and defense counsel to believe that subpoenas had been issued at trial for the "original" letter, with the result that a less reliable document was admitted. In short, Taylor's claim gives rise to the somber prospect that the Government commited a fraud on the court which ultimately worked a great prejudice to Taylor's case.[15]

[4-6] While Taylor points to no cases involving facts closely tracking those alleged in his motion, we have no doubt that Taylor's general assertion of principle is grounded in respectable authority, i.e., prosecutorial misconduct may so pollute a criminal prosecution as to require a new trial, especially when the taint in the proceedings seriously prejudices the accused. Courts, therefore, have ordered new trials when the

---

15. Alternatively, Taylor's opening brief in No. 78-2512 and reply briefs in both appeals allege that the Goernment's subpoenas were issued during the Grand Jury proceedings, and not during trial. In its opening brief in No. 78-2512, the Government does not specify what type of subpoenas were issued. If the issue of timing were the extent of Taylor's claim, we might be inclined to affirm the dismissal of the coram nobis motion, because grand jury subpoenas would have fulfilled the "judicial process or procedure" requirement of Fed.R.Evid. 1004(2). See note 13 supra. We focus instead on Taylor's further assertion that no subpoenas were issued.

prosecution has knowingly used perjured testimony[16] or withheld materially favorable evidence from the defense;[17] have excluded evidence seized pursuant to

---

16. Under the doctrine of Napue v. Illinois, 360 U.S. 264, 269-72, 79 S.Ct. 1173, 1177-78, 3 L.Ed.2d 1217 )(19590, a conviction violates the Fourteenth Amendment if it is obtained by the use of perjured testiminy which the prosecution knows to be false or later discovers to be false and allows to go uncorrected.

17. In United States v. Agurs, 427 U.S. 97, 103-04. 06 s.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976), the Supreme Court recently reiterated that the demands of due process require the prosecution to turn over materially favorable evidence to the defense. See also United States v. Hibler, 463 F.2d 455, 459-60 (9th Ciur. 1972) (prosecution in a criminal trial owes a due process "duty of candor" to defendant).

unlawful searches;[18] and have dismissed indictments when the defendant was entrapped by the creative concert of police officers in the criminal activities.[19] We see nothing that limits the due process principle to these situations. When a conviction is secured by methods that offend elementary standards of justice, the defendant may invoke the Fourteenth Amendment guarantee of a fundamentally fair trial. See Irvine v. California, 347 U.S. 128, 144-49, 74 S.Ct. 381, 389-92, 98 L.Ed. 561 (1954) (Frankfurter, J., dissenting). Moreover, this principle is not strictly limited to those situations in which the defendant has suffered arguable prejudice; the principle designed to maintain also public confidence in the administration of justice.[20]

---

18. See generally United States v. Calandra, 414 U.S. 338, 356-66, 94 S.Ct. 613, 624-28, 38 L.Ed.2d 561 (1974) (Brennan, J., dissenting), and authorities cited therein.

19. Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976); United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973); Sherman v. United States, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958) United States v. Hermosillo-Nanez, 545 F.2d 1230, 1232 (9th Cir. 1976), cert. denied, 429 U.S. 1050, 97 S.Ct. 763, 50 L.Ed.2d 767 (1977).

20. "This Court has rfejected the notion that because a conviction is established on incontestable proof of guilt it may stand, no matter how the proof was secured. Observance of due process has to do not with questions of guilt or innocence but the mode by which guilt is ascertained." Irvine v. California, 347 U.S. at 148, 74 S.Ct. at 391 (Frankfurter, Jr., dissenting).

Thus, a claim of prossecutorial impropriety of the type pleaded in the subject motion may be a basis for relief in a coram nobis action.[21] We must determine, therefore, whether the District Court erred in denying Taylor[22] an opportunity to prove his allegations.

[7] Before determining whether Taylor is entitled to a hearing, however, we note the problem presented by the assertion of a collateral challenge during the pendency of the direct appeal from a conviction. Generally, the noting of such an appeal severely restricts the filing of a collateral claim with the District Court, to avoid any anomaly associated

---

21. For the purposes of analyzing the issues presented in the appeal, there is no compelling reason to distinguish between coram nobis, § 2255, and habeas corpus case authority; however, cases other than under § 2255 have been earmarked. See also note 25 infra.

22. Taylor's claim of Government fraud would, if proven, meet the various tests for relief in the nature of coram nobis. We do not read Moon v. United States, 272 F.2d 530, 532 (D.C.Cir. (1959), or the District Court to suggest otherwise.

The District Court relied on Moon to deny Taylor's motion for a writ of coram nobis, apparently reasoning that the error alleged in the instant case was, as in Moon, apparent on the record. As will be discussed, infra, we reject this view, as we also reject the District Court's finding that Taylor did not plead sufficient "exceptional circumstances" to come within the pending appeals exception.

with the simultaneous consideration of the same case by two courts. See Black v. United States, 269 F.2d 38, 41 (9th Cir. 1959), cert. denied, 361 U.S. 938, 80 S.Ct. 379, 4 L.Ed.2d 357 (1960); Welsh v. United States, 404 F.2d 333 (5th Cir. 1968) (per curiam); Womack v. United States, 395 F.2d 630, 631 (D.C.Cir.1968) (per curriam). The usual practice is to make a collateral assertion of error subsequent to the date of decision in the direct appeal. When this path is followed the risk of duplicitious and conflicting judicial administration is minimized, inasmuch as the disposition of the direct appeal may render the motion moot. See Black v. United States, 269 F.2d at 41.

[8] The general rule of forebearance is not, however, a jurisdictional impediment. The District Court may entertain a collateral motion during the pendency of a direct appeal if "extraordinary circumstances" outweigh the considerations of administrative convenience and judicial economy. See Jack v. United States, 435 F.2d 317, 318 (9th Cir. 1970) (per curiam), cert. denied, 402 U.S. 933, 91 S.Ct. 1530, 28 L.Ed.2d 867 (1971); United States v. Davis, 604 F.2d 474, 484-85 (7th Cir. 1979); United States v. Tindle, 522 F.2d 689, 692-93 (D.C.Cir.1975) (per curiam); Womack v. United States, 395 F.2d at 631; United States v. Deutsch, 321 F.Supp. 1356 (S.D.N.Y.1971), aff'd, 451 F.2d 98, 119 n.22 (2d Cir.), cert. denied, 40-4 U.S. 1019, 92 S.Ct. 682, 30 L.Ed.2d 667 (1972). Hence, Taylor's prior appeal from his conviction is not an absolute bar to his concurrent coram nobis motion, though it imposes the burden upon him of proving the existence of

circumstances sufficiently extraordinary to warrant dual proceedings.

[9] Whether that burden has been carried in this case is a close and difficult question. Taylor's coram nobis claim directly and seriously implicates this Court's decision in Taylor's direct appeaL. We affirmed the conviction largely because of our decision to uphold the admission of Exhibit "24" under the aegis of Federal Rule of Evidence 1004(2). That decision, in turn, was founded on the Government's unsubstantiated, albeit unrebutted, declaration at trial that the supoena power had failed to produce the original document. Therefore, Taylor's collateral claim--challenging the truth of the Government's representation--raises a disquieting question which threatens the very basis of our affirmance of Taylor's conviction.

When, as in the exceptional facts of this case, the collateral claim casts such a dark shadow on a pivotal aspect of the direct appeal and, at the same time, implicates the fundamental fairness of the trial and propriety of the Government's actions, it is our view that the concerns for justice are best served by prompt inquiry either confirming or dispelling the suspicion of irregularity raised. This is particularly true when, as here, the Government has refused forthrightly to account for or support its critical representations of fact. Accordingly, we hold that the District Court erred in dismissing Taylor's motion solely because the direct appeal was pending before the Court.

[10] Passing to the merits of this appeal, we must decide whether the District Court otherwise acted property in dismissing Taylor's motion for writ of coram nobis without the benefit of a hearing. Our task in analyzing his contention is made more difficult by the fact that the District Court, in passing on Taylor's motion, gave only scant elaboration for its summary dismissal.

[11, 12] The prosecuting attorney's alleged misrepresentations, which form the basis of Taylor's motion, are included in the trial record.[23] As a consequence, the District Court appears to suggest in the order denying the motion, and the Government clearly argues on appeal, that any error in the trial court's admission of Exhibit "24" was reflected in the trial record and, hence, should have been asserted in the direct appeal. Therefore, the argument proceeds, Taylor is relegated to asserting his argument, if at all, in the direct appeal and not by way of writ of error coram nobis. We have little quarrel with the proposition that ordinarily the erroneous admission of evidence at trial is an error which should be challenged by taking an appeal from the judgment of conviction. See Cauley v. United States, 294 F.2d 318, 320 (9th Cir. 1961); Barber v. United States, 197 F.2d 815 (10th Cir.) (per curiam), cert. denied, 344 U.S. 857, 73 S.Ct. 94, 97 L.Ed. 665 (1952). Yet that salutory principle finds no application here, and to invoke it is

---

23. See note 5 supra.

to misapprehend and obscure Taylor's claim. The coram nobis motion does not focus on the propriety of the trial court's reliance on the prosecuting attorney's statements, without more, in the admission of Exhibit "24." That matter was, properly, addressed in the direct appeal. Taylor's collateral motion, rather, strikes at the veracity vel non of the Government's representations to the trial court. On that issue, the record is barren. Indeed, it is because the collateral challenge propels us outside the record into the murky realm of speculation that we harbor doubts about the fairness of Taylor's trial.[24]

Thus, in our view, the District Court erred in summarily denying Taylor's claim merely because the challenged statements appear in the trial record.

[13,14] The Government, in opposition to such a conclusion, insists that Taylor has not carried his burden of raising a question about the falsity of

---

24. Analogous situations involving matters which, if proven, would amount to a denial of a fair trial and which cannot be raised on direct appeal because they are outside the scope of the trial, are cognizable upon collateral motion. See the cases collected in Houser v. United States, 508 F.2d 509, 517-18 (8th Cir. 1974), including circumstances of coerced confessions, suppression of helpful evidence by he prosecutor, the Government's knowing use of false testimony, and the falsification of a transcripts by a prosecutor.

the prosecuting attorney's comments. Since we deal here with the dismissal of a petition for coram nobis with no hearing, we must determine, as we do with claims under § 2255,[25] whether the "motions and the files and records of the case conclusively show that the prisoner is entitled to no relief."[26] See United States v. Boniface, 601 F.2d 390, 393 (9th Cir. 1979); Dukes v. United States, 492 F.2d 1187, 1188 (9th Cir. 1974) (per curiam); Lopez v. United States, 439 F.2d 9987, 999-1000 (9th Cir. 1971). This inquiry necessitates a two-fold analysis: (1) whether the petitioner's allegations specifically delineate the factual basis of his claim, Diamond v. United States, 432 F.2d 35, 37 (9th Cir. 1970); Wagner v. United States, 418 F.2d 618, 621 (9th Cir. 1969); and (2) even where the allegaitons are specific, whether the records, files and affidavits are conclusive against the petitioner.

---

25. Whether a hearing is required on a coram nobis motion should be resolved in the same manner as habeas corpus petitions. Owensby v. United States, 353 F.2d 412, 417 (10th Cir. 1965), cert. denied, 383 U.S. 962, 86 S.Ct. 1234, 16 L.Ed.2d 305 (1966).

26. 28 U.S.C. § 2255 (1976) provides, in pertinent part:

> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto.

United States v. Moore, 599 F.2d 310, 312 (9th Cir. 1979), cert. denied, 444 U.S. 1024, 100 S.Ct. 687, 62 L.Ed.2d 658 (1980). Since the subpoena issue does not appear on the record, but is an extrinsic matter, the principal legal question is whether Taylor has endowed his petition with sufficient factual particulars to require a hearing.

In support of his assertion that the Government misled the trial court and defense counsel, Taylor points first to the record to demonstrate that the Government's statements were not substantiated. To overcome the presumption of verity borne by the prosecuting attorney's statements, Taylor relies largely on the affidavit of Stephen D. Guy, defense counsel at trial. Guy states in his affidavit that he was informed by Donald Seifers, the agent responsible for the Government's subpoenas in this case, that, at best, some grand jury subpoenas may have been issued, but that Seifers was certain that the original letter had not been subpoenaed for the purpose of trial from at least two of the appropriate parties. i.e., Continental Bank and Home Federal.

Viewed against the record, Taylor's claim does not lack for clarity, focusing as it does on the subpoena issue. Moreover, his charge is fortified by an affidavit which sets forth clear factual averments giving rise to a serious question as to the subpoenas. Compare Wagner v. United States, 418 F.2d at 621 (§ 2255 movant need not "detail his evidence," only make "factual allegations"), with Wacht v. Cardwell, 604 F.2d 1245 (9th Cir. 1979) (mere allegation that the state trial judge failed to

inform the defendant about his parole ineligibility was too general to require a § 2254 hearing), and Eaton v. United States, 384 F.2d 235 (9th Cir. 1967) (in a motion to vacate sentence based on defense counsel's failure to call a material witness, the allegations were insufficient to sustain an inference that the testimony would have been favorable to appellant). Likewise, the consequences of the claim presented, if true, are manifest, since Exhibit "24" bore heavily on a pivotal issue at trial, i.e., Taylor's usage of interstate communication to perpetrate a fraud.[27] In short, Taylor's claim is clear, detailed, palusible, and unrebutted by the record.

Further, this case presents an unusual situation because the Government has made no effort specifically to deny Taylor's charges--much less to produce the subpoenas in question. Despite the uncertainty surrounding its trial declarations, the Government has consistently resisted accountability by interposing technical arguments, some of which have been referred to above. The Government's response plainly does nothing to controvert the substance of

---

27. This is sufficient to distinguish such cases as United States v. Bowers, 534 F.2d 186, 193 (9th Cir. 1976), where, assuming the appellant's showing was sufficient to establish that his counsel's telephone had been tapped, nothing was offered to suggest any connection between the claimed surveillance and the trial proceedings.

appellant's claim. To the contrary, it serves to reinforce the lingering doubts in this case since proof of the subpoenas, if it exists, is presumably in the hands of the Government. Taylor's inquiry, rather than being opposed, should have been welcomed by the Government as a means of building greater public confidence in our judicial system.

In the particular circumstances of this case--where at stake are both the rights of the individual before this Court and the sanctity of the courts generally--we are unprepared to say at this juncture that Taylor has failed to state a claim. Whether or not there is fatual support for Taylor's allegations should be the subject of further proceedings before the District Court.

We have concluded that there should have been a hearing in this case. If the Government did, in fact, subpoena the original letter, this should be easily demonstrated. It is frankly and sincerely our hope that such proof is forthcoming, obviating the need for further inquiry. But, on the other hand, if in the course of the hearing Taylor's claims are borne out, the appropriate remedy can be promptly determined.[28]

---

28. While our earlier comments demonstrate our concerns for the due process safeguards which may ultimately come into play in this case, see text accompanying notes 16-22 supra, we withhold judgment

Accordingly, the coram nobis writ will be remanded to the District Court for further proceedings in conformity with this opinion.

SO ORDERED.

WALLACE, Circuit Judge, concurring in part and dissenting in part:

I concur in the affirmance of Taylor's conviction (No. 78-2512), but respectfully dissent from the majority's treatment of the coram nobis issue (No. 79-1240).

I believe the majority errs in reversing the district judge's holding that the petition for a writ of coram nobis is untimely because of the pendency of the direct appeal of conviction. I agree that there is no jurisdictional impediment to hearing a coram nobis petition during the pendency of a direct appeal. Jack v. United States, 435 F.2d 317, 318 (9th Cir. 1970) (per curiam), cert. denied, 402 U.S. 933, 91 S.Ct. 1530, 28 L.Ed.2d 867 (1971); Womack v. United States, 395 F.2d 630, 631 (D.C. Cir. 1968) (per curiam). The majority, however, gives

---

28. (Continued)

as to the extent of prosecutorial malfeasance or prejudice to the appellant necessary to warrant relief. The District Court will be able to pass on these issues, if they in fact exist, with the assistance of the complete factual record not presently before this Court.

short shrift to the requirement that there be "extraordinary circumstances" before such a petition may be reviewed. The basis for this requirement is that "determination of the direct appeal may render collateral attack unnecessary." Id. Thus, for example, if we had reversed Taylor's appeal, his petition for a writ of coram nobis would have been unnecessary and would have been a waste of judicial resources. By affirming the district judge, we would not deprive Taylor of his opportunity to seek a writ of coram nobis. Indeed, the usual procedure is to seek such a writ after the direct appeal is decided.

The majority appears to take the postion that because the coram nobis claim and the claim on appeal are related, the disposition of the coram nobis question could undermine the decision on appeal. This, as I read the majority opinion, provides the "extraordinary circumstance" that warrants the propriety of a collateral attack during the pendency of a direct appeal. To make this the standard for permitting a collateral attack would eliminate the "extraordinary circumstance" requirement. If this reading is correct, regardless of the relationship between the arguments made in support of coram nobis and reversal of conviction, granting a writ of coram nobis will always, in the sense used by the majority, "undermine" the affirmance of a conviction. The relationship between the arguments on appeal and on coram nobis does not strengthen the majority's position. Our disposition of the legal evidentiary question on appeal remains valid regardless of whether the prosecutor's representation was true, just as any disposition of a legal issue on appeal would remain valid

even if subsequently set aside on a collateral issue.

The majority appears to treat this case as a limited exception, but has failed to make any analysis of when an "extraordinary circumstance" exists such that a collateral attack pending appeal is permissible. I have been able to locate only one court of appeals opinion to identify an "extraordinary circumstance." In United States v. Tindle, 522 F.2d 689 (D.C. Cir. 1975), the court held that a section 2255 motion alleging ineffective assistance of counsel was permissible despite the pendency of an appeal. Id. at 692-93. The D.C. Circuit reached this conclusion as the best possible resolution of the tension between its precedents in Womack v. Unites States, supra, and United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973). See United States v. Tindle, supra, 522 F.2d 692-93 & n.10. Taylor would have us read Tindle broadly to stand for the proposition that whenever the desired relief cannot be sought on appeal, it may be sought collaterally pending appeal. I have substantial doubts whether our circuit should adopt even the narrowest reading of Tindle, but there is certainly no basis for the broad reading of Tindle that Taylor urges. Indeed, even if there were valid reasons for adopting the broad reading, I am not convinced that Taylor had no remedy on appeal. Taylor claims that the basis for his coram nobis petition is that the defect, the prosecutor's alleged misrepresentation about the existence of subpoenas, lies outside the record. As footnote 5 in the majority opinion indicates, the

district judge did not require the prosecutor's oral representations in any event, it is at least arguable that Taylor had a remedy on appeal. It would have been most efficient for him to raise his arguments on appeal, then, if unsuccessful, seek a writ of coram nobis, rather than burden the courts with two simultaneous proceedings.

The majority improperly expands the "extraordinary circumstances" exception to the extent that it effectively eliminates the rule preventing collateral attacks to criminal convictions during the pendency of direct appeals from the convictions. I would hold that the district judge properly dismissed the petition for a writ of coram nobis to the extent that the dismissal was without prejudice to Taylor's ability to refile after appeal. Because I think the petition was untimely, I would not reach the issue of whether a hearing would have been held.

APPENDIX B

FILED

JUNE 17 1981

RICHARD H. DEANE
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | |
| Plaintiff-Appellee, | ) | Nos. 78-2512<br>79-1240 |
| v. | ) | |
| | ) | ORDER |
| RICHARD E. TAYLOR, | ) | |
| Defendant-Appellant. | ) | |
| | ) | |

---

Before: ELY and WALLACE, Circuit Judges,
and TAKASUGI,* District Judge

Of the judges constituting the panel originally concerned with the subject

cause (Judges Ely, Wallace, and Takasugi), Judges Ely and Takasugi have voted to deny the Petition for Rehearing. Judge Wallace would grant the Petition for Rehearing. Judges Ely and Takasugi also recommend that the suggestion for en banc rehearing be rejected, while Judge Wallace recommends that such suggestion be adopted.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The Petition for Rehearing is denied and the suggestion for a rehearing en banc is rejected.

---

*The Honorable Robert M. Takasugi, United States District Judge, Central District of California, sitting by designation.